

No. 14770

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIR-
PORTS, INC., a Corporation, PETER A. BANCROFT and VINE-
LAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY,

Appellees,

and

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN
COUNTY, CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C.
FINN, and INTERNATIONAL AIRPORTS, INC.,

Appellees.

APPELLANT VINELAND'S OPENING BRIEF.

ROY GARGANO,

County Counsel,

KIT L. NELSON,

Assistant County Counsel,

1110 West 26th Street,

Bakersfield, California,

*Attorneys for Appellant Vineland Elementary
School District of Kern County, California.*

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Appellees.

APPELLANT VINELAND'S OPENING BRIEF.

Opinion Below.

The opinion below may be found in 127 Fed. Supp. 158
and R. 125-142.

Jurisdiction.

The jurisdiction of the District Court rested on 28
U. S. C., Section 1345. A judgment was entered by the
District Court on February 8, 1955. [R. 125-142.] No-
tice of appeal was filed by Appellant herein May 27, 1955.
[R. 994.] The jurisdiction of this Court rests on 28
U. S. C. 1297.

Questions Presented.

Whether conditions precedent existed the performance of which were necessary prior to passage of right, title and interest in that certain C46A aircraft N111H (hereinafter referred to as aircraft in suit or subject aircraft) from Appellant to Appellees Finn, whether such conditions precedent were performed and whether therefore Appellant was and is entitled to immediate possession of the aircraft in suit and the owner thereof.

Whether, assuming for the purposes of this question that the conditions of the sale were conditions subsequent, said sale was nonetheless a conditional sale, the conditions of which have not been performed and for which Appellant had and has a right to immediate possession to the aircraft in suit and is the owner thereof.

Specifications of Error.

1. The Court erred in that portion of the judgment which holds that Appellant sold, Transferred and delivered to Appellees Finn all of its right, title and interest in and to the aircraft in suit on February 28, 1951. [R. 160(2).]

2. The Court erred in finding and concluding that Appellant sold, transferred and delivered to Appellees Finn all of its right, title and interest in and to the aircraft in suit. [Findings, R. 150(3); Conclusion, R. 156 (2).]

The Court erred in those portions of the Judgment, findings of fact and conclusions of law which purport to hold, find or conclude that any party to the subject suit

has any right, title or interest or right to immediate possession which is prior to that of Appellant. [Judgment, R. 160-162; Findings, R. 150(2), 154(15), 155(18); Conclusion, R. 156(2); 157.]

Statement.

This action was instituted by Appellee United States for declaratory relief, breach of contract and claim and delivery, alleging ownership and right to immediate possession in the aircraft in suit. Appellee United States also alleged damages for breach of contract against Appellant and against Defendant Bancroft, Superintendent of the Appellant School District, for inducing breach of contract.

On or about the 25th day of June, 1946, defendant Peter A. Bancroft executed a purchase order, No. 101, WAA Form 66 [Vineland's "Exhibit D"], which included one (1) C-46 Curtis Commando, Catalog No. 42-2420, said aircraft being the subject C-46 N111H, No. 23645.

On or about June 25, 1946, Peter A. Bancroft executed a WAA Form 65 [Pltf. "Exhibit 1"] purporting to act as the authorized agent of the Appellant, providing for the transfer of the subject C-46 N111H, No. 23645, from the United States Government to Appellant under provisions of Surplus Property Act of 1944, Public Law 457.

On or about the 10th day of July, 1946, R. F. Bates executed in behalf of the Federal Government a sales receipt to Peter A. Bancroft [Deft. Finns' "Exhibit J"],

in the sum of Three Hundred Dollars (\$300) in full payment for the purchase of one (1) AT-6 and one (1) C-46, and said C-46 is the subject Curtis Commando N111H, No. 23645.

On or about the 25th day of June, 1946, in Ontario, California, the United States Government released custody of said aircraft to J. D. Poole, and the Federal Government duly executed a "Release of Custody of Aircraft" Form 1316, S.W.P.D.—B.P. [Pltf. "Exhibit 4"], on said date.

On or about the 25th day of July, 1946, said aircraft was flown from Ontario, California, to a field adjoining the Sunset School, which is a school owned, operated and maintained by Appellant in the County of Kern, State of California; and said aircraft remained at said location until on or about the 15th day of August, 1952, and was used by Appellant for educational purposes.

Pursuant to an offer made by Appellee Finn to purchase the subject C-46 aircraft from Appellant in December of 1950, the Appellant, by and through its duly elected and qualified board of trustees, did call and advertise for the reception of bids for the disposal of the subject aircraft to the highest bidder.

Said notice [Vineland's "Exhibit B," R. 57], was duly and properly published according to law; and that said notice called to the attention of all bidders that said aircraft was acquired by Appellant from the United States Government and War Assets Administration and was subject to restrictions on use; and that the successful bidder would

be required to secure releases of said restrictions from the proper agency of the United States.

On or about the 22nd day of January, 1951, Appellees Finn submitted a bid to Appellant for the purchase of subject aircraft, said bid was accepted by the Appellant; and that in said bid Appellees Finn expressly agreed to secure the consent of the Government of the United States to the sale of said C-46 aircraft, and to secure a waiver from any and all proper governmental agencies of any and all restrictions on the use of said aircraft existing by virtue of any Federal law or by virtue of any agreement between the Appellant and the United States Government or agency thereof.

On or about the 28th day of February, 1951, Appellant and Appellees Finn did enter into a written agreement concerning the said C-46 aircraft [Vineland's Exhibit B, R. 59]; that in said agreement it was expressly agreed, and it was the intention of all parties thereto, that the transfer of title, possession and use of said aircraft was subject to said Appellees Finn obtaining the consent of the United States Government and related governmental agencies thereto to the subject sale and use of said aircraft; and it was also pointed out in said agreement, and was the intention of the parties, that any transfer of said C-46 aircraft was subject to any and all restrictions imposed by the United States Government concerning the use and sale thereof.

Said agreement contemplated the acquisition and furnishing of materials and the performance of labor, as

well as the payment of cash in consideration for the subject aircraft.

Appellees Finn obtained a registration certificate from the Civil Aeronautics Authority to said aircraft and that said Appellees Finn represented to Peter A. Bancroft that consents had been obtained in accordance with the contract between the Finns and the Appellant, and that the request for possession of said aircraft by Appellees Finn was for the purpose of obtaining work and materials on and for said aircraft which could not be obtained or done at the Sunset School, and that the use by Appellant of said plane for educational purposes was not to be interfered with, and that the plane would be returned if all the conditions of the agreement between Appellant and the Finns were not complied with.

On or about the 15th day of August, 1952, Appellees Finn thus obtained possession of the subject aircraft and flew said aircraft from the Sunset School location to the Kern County Airport in Bakersfield, California.

Thereafter on or about October 25, 1951, Appellees Finn transferred said aircraft from Bakersfield to Lockheed Air Terminal, Burbank, California where Appellee International Airports bestowed labor and materials, upon said aircraft for which they claim a lien.

Appellee International Airports, Inc., had notice and knowledge of the interests and claims of Appellant to the subject C-46 aircraft, which notice and knowledge was acquired prior to the making of any agreement between the Appellees Finn and Appellee International Airports,

Inc., and had knowledge of the terms and conditions, as set forth in that agreement existing between Appellant and Appellees Finn, with respect to said aircraft, and that this knowledge was obtained by the Appellee International Airports, Inc., prior to its parting with any consideration concerning said aircraft.

In May of 1952, Appellees Finn returned said aircraft to Bakersfield, California at the request of Appellant where on September 18, 1952, the United States Marshal, acting pursuant to claim and delivery process issued on behalf of Appellee United States took possession of the aircraft in suit until October 13, 1952, when he delivered said aircraft to Appellee United States. The Government retained possession thereof until January 18, 1953, when Appellees Finn without permission of the Appellants or Government, took possession of said aircraft and retained possession thereof until February 1, 1953, when Appellee United States again took possession of said aircraft at Scotty's airstrip in the State of Nevada.

Trial was had and Judgment entered [R. 159], Findings and Conclusions filed. [R. 148-159.] Appeal has been taken by the Appellant only from a portion of the judgment, findings of fact and conclusions of law as indicated hereinabove under "Specifications of Errors."

ARGUMENT.

I.

The District Court Erred in Failing to Rule That in Accordance With the Agreement [Vineland's Ex. B, R. 59] and Documents Related Thereto Between Appellant and Appellees Finn, Right, Title and Interest to the Aircraft in Suit Did Not Pass to Appellees Finn Until All Conditions Precedent of Said Agreement and Documents Should Be Performed by Appellees Finn; and in Not Adjudging That Said Conditions Precedent Had Not Been Performed and That, Therefore, the Appellant Was Entitled to Immediate Possession of the Aircraft in Suit, and Was the Owner of All Right, Title and Interest Thereto.

The subject agreement, "Notice for Bids" [R. 57], bid accepted [Finn Ex. "L"], and testimony in connection therewith clearly indicated that in connection with the subject sale, conditions precedent were contemplated, set forth, and intended by the parties prior to the passage of right, title and interest to the subject aircraft to Appellees Finn.

A. The terms of the subject agreement clearly indicate the existence of a condition precedent to transfer of right, title and interest in that in Paragraph 4 [R. 62] of said agreement it is clearly indicated that "This agreement is *contingent* upon Contractors' ability to secure the necessary clearances from the Government. . . . Therefore, notwithstanding any other provisions in this agreement. . . ." (Emphasis ours.) The word "contingent" in said agreement makes it clear that there are such condi-

tions precedent to the very existence of the agreement itself and “notwithstanding” any other provisions in the agreement which may appear to the contrary. Therefore, although there appear to be provisions transferring immediate right, title and interest to the aircraft in suit in said agreement [Par. 1 of said Agreement, R. 60], it is clear from the face of the agreement itself that a condition precedent was intended, particularly on the matter of first obtaining clearances of the Government of any restrictions on the use and possession of the subject aircraft.

B. That a condition precedent was and could be the only intention of the parties to the agreement is clear since in order for the agreement to be legal and proper it must contain the same provisions and conditions that appeared in the “Notice for Bids” and the bid which was accepted by the school district. [See *Ryan v. Ashbridge*, 10 Pa. Dist., R. 153, 160, 161; *Miller v. McKinnon*, 20 Cal. 283.] Said Notice for Bids and the bid which was accepted by the school district clearly indicated that the successful bidder would be required to secure necessary releases of restrictions on the use of the aircraft in suit from the Federal Government. The law is clear that the actions of a public agency are presumed to have been done in accordance with the law. Presuming that the agreement was legally entered into by the school district, we must presume that the requirements of the “Notice for Bids” were also placed in the subject agreement. We must therefore find that the conditions precedent of

obtaining releases to restrictions on the subject aircraft from the United States prior to the transfer of the right, title and interest to the aircraft in suit to Appellees Finn as indicated by the "Notice for Bids" was transferred into the agreement as a condition precedent. To hold otherwise would be to hold that the governing board acted illegally in not providing the same terms and conditions in the agreement that were provided for in the "Notice for Bids" and the bid as accepted, which would mean that the agreement as entered into would be illegal and void.

C. A passage of title to the subject aircraft after the performance of certain conditions precedent was the only legal method wherein the school district could properly sell the subject aircraft. To find that title passed prior to the performance of the conditions of the subject sale, *i.e.*, payment of money, performance of service and furnishing of materials, would be to recognize that the school district had *lent the credit* of the district to Appellees Finn in connection with the subject sale. We must presume that the school district knew its legal bounds and acted in accordance therewith. It must therefore be presumed that a condition precedent was intended and was a part of said agreement, or in the alternative it must be determined that said agreement was illegal and void.

1. The lending of the public credit by a school district is unconstitutional. (Cal. Const., Art. IV, Sec. 31.)

D. At first glance there would appear to be an ambiguity in the terms of the subject agreement concerning the

time for the passage of right, title and interest of the subject aircraft. However, when the agreement is read in its entirety and with the "Notice for Bids," and the testimony of the parties is considered as to their intent, it is clear that a condition precedent was both intended and in fact exists. The law is clear that where an ambiguity exists in the terms of a contract the Courts will look to the intent of the parties, and parol evidence may be used to explain the ambiguity. (*Buckbee v. Hodenadel Co.*, 224 Fed. 14, 139 C. C. A. 478, L. R. A. 1916C 1001; Williston, Contracts, Sec. 613.)

1. Uncontradicted testimony of the Chairman of the Board of Trustees (Johnson) and the Superintendent of the school district (Bancroft) at the trial of this action indicated that the intent was that the conditions of the subject agreement and related documents were to be precedent to passage of title. [See R. 519, 522, 528-530, *re* Bancroft's testimony; R. 601-603, *re* Johnson's testimony.]

2. The jury found in its special verdict, in answer to Interrogatory No. 2 [R. 112], that the school district did not intend to transfer title to the airplane in suit to Appellees Finn at any time before all necessary consents and releases and waivers of the Government had been procured. The Court in its Memorandum of Decision adopted the findings of the jury as its own. [R. 127.]

a. Consistent with this intention of a condition precedent and as further evidence thereof is the fact that when physical possession of the aircraft in suit was released to Appellees Finn the District Super-

intendent and the Appellant intended that such possession was solely for the purpose of having work done upon said aircraft which could not be done on school district grounds.

(1) The jury so found in its special verdict in answer to Interrogatory No. 7 [R. 113], which finding was adopted by the Court in its Memorandum of Decision.

(2) The testimony of Appellees Finn and their *actions* in returning the subject aircraft to Bakersfield from Lockheed Air Terminal in May of 1952 at the request of the school district's counsel [see R. 474-475] is further uncontradicted evidence of the intention of both Appellees Finn and Appellant that the aircraft was merely flown to Los Angeles for the sole purpose of having work done thereon and that the transfer of right, title and interest in and to said aircraft was not to occur until all conditions in connection with the subject agreement and surrounding documents had been complied with.

(3) Testimony of the District Superintendent and the Chairman of the Board of Trustees also indicates the intention of the school district and the Superintendent in connection with the release of physical possession of the subject aircraft. [R. 574-575, *re* Bancroft; 601-603, *re* Johnson.]

E. The evidence presented in the District Court clearly shows that the conditions of the subject agreement and related documents have not been performed:

1. Purchase price for said aircraft has not been paid. [R. 473, 487-489.]

2. Work has not been completed and materials have not all been furnished. [R. 473, 487-489.]

3. Consents, releases and waivers by the Federal Government were not obtained. [Special verdict of jury in answer to Interrogatorys Nos. 14, 15; R. 116, 117.]

F. Appellee International Airports, Inc., acquired no right in such airplane as against the Appellant.

1. "An owner of personal property has the right to make an agreement to sell the same and deliver possession thereof to the buyer upon the condition that the title thereto shall, nevertheless, remain in the seller until the price agreed on has been fully paid or other conditions relating to the sale be performed, and the title so withheld by the owner will, until full payment, be superior to that of a subsequent mortgagee or purchaser of such personal property from the buyer, even if such subsequent mortgage or purchase was made without knowledge or notice of the reservation of title." (*Oakland Bank of Savings v. Calif. Pressed Brick Co.*, 183 Cal. App. 295, 297, 191 Pac. 524; *Phelps v. Loupias*, 97 Cal. App. 2d 350.)

2. Defendant International Airports, Inc., had both knowledge and notice of Appellant's interests and claims to the subject aircraft at the time of advancing money on said aircraft to Appellees Finn and also when labor was performed on and materials were furnished to Appellees Finn for the subject aircraft. [See special verdict of jury in answer to Interrogatories Nos. 10 and 11, R. 114 and 115.]

II.

The District Court Erred in Failing to Rule That the Agreement [Vineland's Ex. B; R. 59] and Documents Related Thereto Between Appellant and Appellees Finn Was a Conditional Sales Contract, and That a Condition or the Conditions Thereof Had Not Been Performed by Appellees Finn and in Not Adjudging That Therefore the Appellant Was Entitled to Immediate Possession of the Aircraft in Suit and Was the Owner of All the Right, Title and Interest Thereto.

Assuming for the purposes of this argument that the Court determines that a condition precedent does not exist to the said sale of the subject aircraft, it clearly appears from the subject agreement, Notice of Bids, other documents, and testimony in this action that a conditional sales contract was contemplated, and that the conditions set forth in said documents were, at least, conditions *subsequent*, and that a breach of such a condition or conditions would give the Appellant a right to repossess the subject aircraft and that the legal right, title and interest thereto remained in the school district until such time as all conditions of the agreement, Notice for Bids, bid accepted, and other documents had been complied with.

A. One who sells property under a conditional sale does not have a mere lien on the property, but retains the title thereto and merely gives the conditional right of possession to the buyer, who may acquire title only by performing the obligations expressed in the contract. (*Phelps v. Loupias*, 97 Cal. App. 2d 350, 217 P. 2d 748.)

B. A conditional vendee is in the position of a mere possessor. (*Phelps v. Loupias, supra*; *Bice v. Harold N. Arnold, Inc.*, 75 Cal. App. 629, 243 Pac. 468; *Guerin v. Kirst*, 33 Cal. 2d 402, 202 P. 2d 10.)

C. "While an agreement contains no express retention of title on the part of the seller, or words of surrender or cancellation in the event of default of payments, nevertheless, whether or not the contract is one of conditional sale, reserving the title in the seller, or one transferring title to the buyer, is primarily a question of intention." (*Bailey v. Looch, supra.*)

D. "The question whether an agreement relating to the sale of personal property is merely an agreement to sell or a consummated sale and transfer of title may not always be determined from the language of the instrument itself, but reference must often be made to the intention of the parties and the surrounding circumstances." (*Katz v. People Finance and Thrift Company*, 101 Cal. App. 552.)

1. Uncontradicted testimony indicates clearly that a conditional sales contract was intended by the parties to the subject agreement, Notice of Bids, and bid accepted. [R. 519, 522, 528-530 *re* Bancroft; R. 601-603 *re* Johnson.]

2. Special verdict of jury in answer to Interrogatories Nos. 2 and 7 [R. 112 as to No. 2 and R. 113 as to No. 7], which findings were adopted by the Court as its own. [R. 127.]

3. Actions and testimony of Appellees Finn concerning return of aircraft to Bakersfield at request of school district's counsel. [R. 474-475.]

4. The terms of the subject agreement clearly indicate on its face the intention that such an agreement is to be a conditional sales contract wherein it provides in Paragraph 4 of said agreement [R. 62] that "This agreement is *contingent* upon Contractors' ability to secure the necessary clearances from the Government . . . Therefore, *notwithstanding* any other provisions in this agreement" (Emphasis ours.)

5. For a more thorough discussion and examination of testimony and documents indicated in Paragraphs 1, 2, 3 and 4, above, see Appellant's argument herein concerning conditions precedent.

E. Since the conditions in the agreement, Notice for Bids, and bid accepted concerning said sale between Appellant and Appellees Finn, requiring that releases, waivers and consents be obtained by Appellees Finn from the United States have not been complied with by Appellees Finn, and many of the conditions requiring payment of cash, work and materials to be furnished have not been performed (see discussion *re* conditions precedent, Par. E. 1, 2 and 3, pp. 12-13, hereof), title to such airplane was never passed to Appellees Finn, and Appellant is therefore entitled to immediate possession of the subject aircraft.

F. Appellee International Airports, Inc., acquired no right in such airplane as against Appellant for the same reasons as set forth in Paragraph F, 1 and 2, page 13, hereof.

Conclusion.

It is submitted that the judgment should be reversed as to those matters set forth in the specifications of error in this brief and affirmed as to all other matters.

Respectfully submitted,

ROY GARGANO,

County Counsel,

By KIT L. NELSON,

Assistant County Counsel,

*Attorneys for Appellant Vineland Elementary
School District of Kern County, California.*

